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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 990

MORTON FRIEDMAN,

Petitioner,

v.

LEWIS B. SCHWELLENBACH, individually and as Secretary of Labor, HARRY B. MITCHELL, FRANCES PERKINS and ARTHUR S. FLEMMING, individually and as members of the Civil Service Commission,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia

PETITION FOR REHEARING

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PETITION FOR REHEARING

We respectfully urge the Court to take cognizance of the great importance of this case, both as it affects petitioner and in its implications for the Civil Service as a whole. Events which have occurred since the decision of this Court denying the petition for a writ of certiorari have emphasized the significance of the issues here presented.

The petitioner was discharged from his Government post on the instruction of the Civil Service Commission based

upon what it termed "reasonable doubt as to his loyalty" (R. 50-51). His two employing agencies, however, both prominent in the war effort, were satisfied as to his loyalty and exercised their best efforts to retain him (R. 31-33, 38). The Commission's Board of Appeals and Review recommended his exoneration (R. 32) and he was permitted to retain his post during proceedings on his case for nearly two years after the Commission had decided that his dismissal was called for (R. 50-52).

The Commission's doubt arose, according to its letter to petitioner, because he opposed American participation in the war against Germany until some time after Russia's belligerency, and because he was an active member of an organization called the American Peace Mobilization, which was similarly opposed to American involvement (R. 75-76, n. 2).

The dismissal was thus based on petitioner's opinions on a political issue then current, and on his affiliation with an organization espousing those views. While the Commission characterized the organization as "Communist-dominated", it did not allege it to be unlawful or to advocate the overthrow of the Government. As to the petitioner individually, he was not charged with being a member of the Communist Party, and the Government in its answer specifically "admit(ted) that * * * (petitioner) was not charged with having violated any of the provisions of The Hatch Act" (R. 23), which is the statute that prohibits Federal employment of persons having membership in organizations advocating the overthrow of the Government. Section 9A(1), 53 Stat. 1148, 18 U. S. C. § 61(i)(1).

The case raises in an acute form several issues of great importance to the civil service. These involve, among others, the propriety of the standards utilized for the testing of so-called loyalty of Government employees; the applicability to such employees, as a special class, of the doctrine of guilt by association; the denial to them of

certain of the basic requirements of procedural due process; and the availability of judicial review to enforce the statutory rights of Federal employees to political freedom. These questions, and others raised by the case, have never before been reviewed by this Court and are, we submit, of obvious importance.

If any evidence of this fact is needed in addition to what has already been presented to the Court, it is supplied by Executive Order No. 9835, March 21, 1947, 12 Fed. Register 1935. Issued within a week after the denial of certiorari in this case and broadly assumed to secure its sanction from this action of the Court, the Executive Order sets forth an elaborate permanent mechanism for adjudicating what is characterized as disloyalty in Federal employees numbering over 2,000,000 and in all applicants for Federal employment. The problems raised by this case are in many respects paralleled by the Executive Order, which therefore emphasizes the need for a decision by this Court on the issues here presented.

In a section headed "Standards", the Executive Order sets up, among the "activities and associations" which may be considered in passing on loyalty, conduct which on its face is criminal, including sabotage, espionage, treason and sedition; conduct which is already ground for dismissal, such as advocacy of forceful or violent revolution; and finally,

> "membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, Fascist, Communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means".

The standards set up in this provision are broad and undefined. They embody into law all the vices of guilt by imputation. The term "sympathetic association", for example, is susceptible of an infinite number of meanings.* So, too, are the terms "totalitarian, Fascist, Communist or subversive", which by frequent and indiscriminate usage have come to be the stock language of political abuse, rather than proper standards for quasi-judicial determinations of loyalty. The method of determining guilt by association and the use of political cliches to test loyalty involved in petitioner's dismissal have now been embodied as an addition to the laws governing the civil service by the Executive Order. Review of the standards adopted in this case is warranted by the probability of their widespread application.

Under other provisions of the Order, the employee whose loyalty is questioned is not entitled to the right of confrontation or of examination of his accusers (II, 2, A and B); their identity may be withheld from him and even from the head of his employing agency (IV, 1 and 2); he may not challenge the designation applied to an organization by the Attorney General; and, if so-called "security considerations" exist, need not even be given a specific statement of the charges against him (II, 2, 8). In the present case too, no evidence was presented against petitioner. As stated without dispute in the affidavit in support of his motion for summary judgment (R. 37),

> "The case against him (petitioner) was based entirely upon an investigator's report, never read or shown to deponent, but which is kept in the secret files of the Civil Service Commission and consists entirely of alleged statements of anonymous and unsworn witnesses. At this hearing, the Chairman of the said

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* "Washington Witch-hunt", by Henry Steele Commager, The Nation, Apr. 5, 1947.

> Board of Appeals and Review (of the Civil Service Commission) stated on the record:
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> 'Incidentally, we have no more information than you do as to who the witnesses were, except in a very few isolated cases, and we don't know in some respects just how they came into possession of the information which they had given. It is not our investigation.' "

Similarly, although the alleged character of the American Peace Mobilization loomed large in the Commission's finding of petitioner's doubtful loyalty, nowhere was any evidence presented as to that organization which petitioner could controvert.

Review is warranted on another important ground. The opinion below stated that review of the findings of the Civil Service Commission that led to petitioner's dismissal —an executive managerial matter—was beyond the province of the judiciary (R. 76). In our petition for certiorari (p. 27), we expressed the view that this holding, in the light of the violations of petitioner's substantive and procedural rights, was in conflict with the decision of this Court in *United States* v. *Wickersham*, 201 U. S. 390, where minute inquiry was made into the legality of a dismissal of a Federal employee. Failure to review the decision below means that in the ominous situation in which Federal employees now find themselves, under the virtually unlimited scope of the Executive Order, dismissals on whatever ground are immune from judicial scrutiny, so long as the severances are accompanied by appropriate incantations of the disloyalty formula. Thus the entire body of statutory law protecting the political freedom of Federal employees (Civil Service Act, Sec. 2, 22 Stat. 403, 5 U. S. C. § 633; Hatch Act, Sec. 9(a), 53 Stat. 1148, 18 U. S. C. § 61h) becomes unenforceable. We do not believe that this is the law. But whether or not it is, we submit that the question of the availability of judicial remedies to correct denials of substantive and procedural rights supposedly guaran-

teed by statute to Federal employees, is of sufficient importance, both to petitioner, the present civil service, and all potential civil servants, to warrant the judgment of this Court on the issue.

In *West Virginia* v. *Barnette,* 319 U. S. 624, at 642, the Court said:

> "If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. * * * If there are any circumstances which permit an exception, they do not occur to us."

If an official prescription of orthodoxy is ever to be imposed in this country, it would be naive to expect it in the simple form of an edict to all to think certain thoughts or not to think others. The command will undoubtedly have a surface plausibility in an effort to give it the semblance of conformity to legal norms. A question presented by this case is whether the test of loyalty here applied is in fact an official prescription of orthodoxy. And because the standard sustained by the court below is likely to be put to expanded use as a result of the Executive Order, we submit that the authoritative judgment of this Court on the point is most vital.

The denial of the petition for certiorari in this case has been widely interpreted as sanctioning the Executive Order here described. This Order is, of course, not here in issue. But the problems here involved are related, and we respectfully submit are so important in their implications that the views of this Court should not be permitted to be inferred from a decision on a petition for certiorari. It may be that petitioner errs in his views of his rights. The questions involved in this case, however, have assumed such great proportions that they call for a definitive expression by this Court.

We respectfully request a rehearing on our petition for certiorari and pray that, on rehearing, the writ issue.

Dated: April 11, 1947.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

April 11, 1947.

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